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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

JUDICIAL COUNCIL OF THE FIFTH JUDICIAL CIRCUIT AND JERRY BUCHMEYER, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS,
Petitioners,

v.

JOHN H. MCBRYDE, DISTRICT JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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INTRODUCTION

The Judicial Councils Reform and Judicial Conduct and Disability Act, Pub. L. No. 96-458, 94 Stat. 2035 (1980), established a mechanism for circuit judicial councils to address complaints that a federal judge is unable to discharge all the duties of office because of physical or mental disability, or has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts. *See* 28 U.S.C. § 372(c). The text of the Act authorizes judicial councils to take various actions in response to proven disability or misconduct, such as issuing private or public censures, § 372(c)(6)(B)(v) & (vi), and ordering that a judge's case assignments be suspended. § 372(c)(6)(B)(iv). Before a council takes any of these actions, however, the statute requires it to give the subject judge "adequate prior notice of any investigation . . . in writing," § 372(c)(11)(A), and an opportunity to "present oral and documentary evidence, to compel the attendance of witnesses and the production of documents, to cross-examine witnesses, and to present argument orally or in writing." § 372(c)(11)(B). Further, the Act does not permit judicial councils to review or take any action against a judge for conduct "directly related to the merits of decisions or procedural rulings. § 372(c)(3)(A).

The passage of the Act in 1980 was controversial in many respects. Serious constitutional questions concerning the Act remain unresolved. Nonetheless, since 1980, section 372(c) has been the sole source of authority on which judicial councils have relied to evaluate allegations of judicial misconduct, and, in a very few instances, to censure a judge for those allegations. *See, e.g.*, *Phelps v. Kelly*, No. 87-372-01 (Jud. Conf.) (imposing public reprimand); *In re Complaint of Judicial Misconduct*, No. 88-372-01 (Jud. Conf.) (imposing private reprimand) (both orders on file at the Federal Judicial Center).

The Judicial Council of the Fifth Circuit departed from the norm when it censured Respondent John H. McBryde, United States District Judge for the Northern District of Texas, in a public order issued on October 20, 1995. The order not only reprimanded Judge McBryde, but also ordered the reassignment of two cases on his docket, without affording him any of the procedural protections set forth in § 372(c). The Council instead relied on 28 U.S.C. § 332 as the basis for its action. Judge McBryde petitioned for mandamus to challenge the order and case reassignments, arguing that a judicial council has no authority—under § 332 or otherwise—to punish a judge because it disagrees with his judicial rulings. A unanimous panel of the Fifth Circuit concluded that § 332 gives judicial councils no power to censure a judge. It also held that the Council's action evidenced a disagreement with Judge McBryde's legal and factual rulings, and that the Council had no authority under *any* statute to remove cases or take other actions against a judge based on such disagreement. The panel resolved these questions of first impression by applying uncontroversial methods of statutory construction in light of settled principles of constitutional law.

Petitioners take the extraordinary position in their petition for certiorari that the Fifth Circuit's decision was wrong, because judicial councils must have authority to evade the procedural requirements of § 372(c) where convenient in order to combat a supposedly growing problem of judicial misconduct. Just as remarkably, Petitioners contend that a judge who is censured by a judicial council does not sustain an injury-in-fact sufficient to create an Article III case or controversy. Petitioners utterly fail to identify any legitimate conflict with the jurisprudence of this Court or with other circuits that might warrant certiorari review. Nor have they presented a convincing case that this issue will recur, or that the Fifth Circuit's opinion imposes any hardship on judicial

councils in the administration of justice for which correction by this Court is otherwise necessary.

STATEMENT OF THE CASE

The background of events precipitating the filing of Judge McBryde's petition for writ of mandamus is thoroughly set forth in the opinion of the Fifth Circuit. We briefly highlight here the most salient facts.

In April, 1995, Judge McBryde was the presiding judge in a criminal case, *United States v. Satz*, No. 4:94-CR-094-R (N.D. Tex.). In connection with the sentencing of the defendant in that case, he held hearings in which he found that an Assistant United States Attorney unjustifiably refused to answer his questions and to supply him with information relevant to the sentencing of the defendant, and misrepresented the nature and scope of an order that supposedly sealed this information. On the basis of these factual findings, he concluded that the Assistant United States Attorney was in contempt of court, although he imposed no sanction.

About the same time, he discovered that the Clerk of the Court had made an error in complying with his order of settlement in a civil case, *Torres v. Trinity Industries, Inc.*, CA 4:90-812-A (N.D. Tex.), by failing to deposit settlement proceeds in an interest bearing account. After he entered an order directing the Clerk to supply him with information explaining the error, the Clerk responded, with the drafting assistance of Chief Judge Buchmeyer, in a highly personal letter that criticized Judge McBryde for entering his order. The letter also stated that the Clerk had taken action to correct the situation in a way that Judge McBryde had expressly disapproved in an earlier order. Judge McBryde issued another order, stating that the Clerk's response had been "so unprofessional and disrespectful of the undersigned judge and

court, and manifested such a high level of insolence, that it borders on, if it does not constitute, contempt of court by one of its statutory officers." The order directed the Clerk to supply further information regarding the misplacement of funds and the amount of loss to the minor plaintiff, but did not impose any sanctions on the Clerk..

In each case, persons aggrieved by Judge McBryde's findings contacted Northern District of Texas Chief Judge Buchmeyer *ex parte*. Judge Buchmeyer, without the benefit of the record on which Judge McBryde had acted, expressed disagreement with the findings underlying Judge McBryde's orders. After discussing his proposed actions with Fifth Circuit Chief Judge Politz, but without notice to Judge McBryde or the other parties to the litigation, Judge Buchmeyer reassigned the cases to himself and vacated Judge McBryde's findings and orders.

Judge McBryde then requested the assistance of the Judicial Council to determine Chief Judge Buchmeyer's authority to effect these reassignments. Chief Judge Politz ordered a Special Committee to study the issues presented in Judge McBryde's request. He informed Judge McBryde that the Committee would take testimony from him and Chief Judge Buchmeyer on these issues. On October 19, 1995, Judge McBryde testified before the Committee. Chief Judge Buchmeyer also testified that day, but Judge McBryde's request to attend that portion of the proceeding was denied. The Committee did not inform Judge McBryde of the identity of any other witnesses who testified against him. Judge McBryde later learned that the Committee took additional testimony out of his presence from the Assistant United States Attorney criticized in the *Satz* case and from the Clerk of the Court criticized in *Torres*. Judge McBryde was not given the opportunity to confront or cross-examine this testimony. Without informing Judge McBryde, the Committee reported its findings to the full Council the next

day. Judge McBryde was not provided, before or after the fact, a written or transcribed copy of that report.

The Council issued and published an order on October 20, 1995, which can only be described as a scathing public reprimand. It declared that Judge McBryde's finding that the Assistant United States Attorney had lied and his subsequent ruling that she was in contempt were "baseless." It stated that its independent "investigation" confirmed that the Assistant United States Attorney's testimony in the *Satz* case had been "truthful, professional and appropriate." It also found that the order directed to the Clerk in *Torres* was "unwarranted." On these bases, it concluded that Judge McBryde's conduct constituted an impediment to the effective administration of justice. It ordered the reassignment of *Satz* and *Torres* pursuant to its own claimed power under 28 U.S.C. § 332(d). It did not rule on whether Chief Judge Buchmeyer had authority under 28 U.S.C. § 137 to reassign the cases.

Judge McBryde challenged the case reassignments by way of a petition for writ of mandamus in the Fifth Circuit. He argued that the Council had no authority to reassign the cases based on disagreement with his findings and rulings. He contended that such reassignments violate Article III of the Constitution because they infringe upon the federal courts' exclusive constitutional authority to decide cases, and they threaten judicial independence. He also argued that the reassignments and reprimand were beyond the power of the Judicial Council, because the Council had not afforded him any of the procedural protections set forth in 28 U.S.C. § 372(c) or inherent in the Due Process Clause.

In a meticulous, fifty-seven page opinion, a unanimous panel of the Court of Appeals found that the disagreement between Judge McBryde and the Council arose out of a "struggle between conflicting interpretations of the facts" in the *Satz* and *Torres* cases. Pet. App. 22a. The Court

expressly found that Judge McBryde had made "reasonable" findings of fact. *Id.* After establishing its own jurisdiction to hear this case (which petitioners do not challenge, except as regards standing), it then held that Chief Judge Buchmeyer did not possess any authority to reassign cases based on disagreement with rulings issued therein, either under the Northern District's local rules and orders for assignment of cases or under § 137. Pet. App. 41a. It further held, on two separate grounds, that the Judicial Council had no authority to reassign the cases. First, it held that the Council possesses no authority to censure a judge pursuant to 28 U.S.C. § 332(d). *Id.* at 46a. Second, it held that the Council may not, in any event, reassign cases because it disagrees with the merits of judicial rulings and factual findings issued by the presiding judge in those cases. *Id.* at 48a.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS APPLIED SETTLED PRINCIPLES OF STATUTORY CONSTRUCTION TO REACH THE ONLY REASONABLE RESULT IN A CASE OF FIRST IMPRESSION

In the first question presented, Petitioners mischaracterize the holding of the Fifth Circuit in an attempt to portray a conflict with this Court's jurisprudence and to conjure a potential crisis for judicial councils attempting to administer the judicial system. Before discussing whether the alleged conflicts and crisis are legitimate, it is necessary to understand clearly the alternative nature of the Fifth Circuit's dual holdings. *First*, expressly noting that it was not passing on the Council's power to "remedy" judicial misconduct under 28 U.S.C. § 332, Pet. App. 46a, the court held that a judicial council "lacks the power to censure a judge under § 332" and found that the Council's actions in this case constituted a censure. Pet. App. 48a. *Second*, it held that a judicial council has no power, under either § 332(d) or § 372(c), to "order a case reassigned based on its

disagreement with the district judge's factual findings." Pet. App. 48a.

A. The Court of Appeals Did Not Rule upon the First Question Presented by the Petitioners

The first question presented in the petition for certiorari is whether judicial councils may ever "rectify" the adverse effects of judicial misconduct by issuing an order under § 332. The Fifth Circuit explicitly declined to answer this question. Pet. App. 46a ("whatever power the Judicial Council possesses under § 332 to remedy judicial misconduct, that power does not include the authority to censure or reprimand a judge for that misconduct"); *id.* at 44a ("it is not unreasonable to view § 332 as empowering a council to remedy judicial misconduct"). Thus, the first question on which the Petitioners urge this Court to grant certiorari is not presented by the case.

To the extent that the arguments presented in the Petition can be construed more broadly to challenge the holding that a judicial council may not *censure* a judge for misconduct pursuant to § 332,[1] there are several reasons why that question does not present an issue worthy of this Court's review.

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[1] The petition nowhere explicitly contests the finding of the Fifth Circuit that "by any objective measure the Judicial Council's reassignment of *Satz* and *Torres*, accompanied by the vacating of Judge McBryde's findings and the entry of starkly contrary findings, was a strong censure of Judge McBryde for his conduct in those cases." Pet. App. 48a. Even if Petitioners had challenged that finding in their Petition, such a challenge would not be a proper basis on which to exercise certiorari jurisdiction, because it involves a fact-bound issue of no general importance.

B. The Judgment of the Court of Appeals Is Supported by an Alternative Holding That Petitioners Have Not Challenged

Petitioners do not challenge the central findings of the Court of Appeals: the Judicial Council's reassignment was based, in the *Torres* case, on a disagreement with Judge McBryde's determination that his orders had not been followed, and, in the *Satz* case, on a belief that Judge McBryde incorrectly found that an Assistant United States Attorney was untruthful during hearings held before him. Even assuming that the Fifth Circuit wrongly held that a judicial council may not censure a judge under § 332, Petitioners have not, and cannot, identify any conflict with the alternative holding of the Court of Appeals—that a judicial council may not reassign cases under § 332 based on disagreement with the merits of judicial decisions. Thus, even if Petitioners were to prevail on the first question presented, it would not lead to a different result in this case.

C. The Fifth Circuit's Decision Does Not Conflict with Decisions of this or Other Courts and Does Not Present Issues of Recurring Significance

In any event, the arguments advanced by Petitioners fail to support their contention that the judgment below conflicts with decisions of this Court and raises problems for the administration of the judicial system. The authority they cite for each argument reveals no such conflict or problems.

1. The Judgment Below Does Not Conflict with Any Case Discussing "Implied Repeals"

Petitioners first contend that the Fifth Circuit's decision conflicts with this Court's cases disfavoring "implied repeals." But the Fifth Circuit did not hold that § 372(c) repealed § 332 by implication or otherwise. Section 332 was

amended and reenacted at the same time § 372(c) was first enacted, all as part of the same legislation. Because the two provisions in their present form had been crafted, discussed and passed by the legislature at the same time, the Fifth Circuit interpreted § 332 in conjunction with the text of § 372(c) and legislative history discussing both provisions. It explained that § 372(c) expressly permits censure for judicial misconduct, Pet. App. 45a, and that the legislative history accompanying the newly enacted language of § 332(d) focused on administrative functions, not disciplinary functions. *Id.* at 47a. It also reasoned that to permit a judicial council to exercise its disciplinary functions under § 332(d) would render superfluous all of the procedural requirements detailed in § 372(c). *Id.* It concluded that the two provisions, as enacted together, precluded a judicial council from acting as a disciplinary body under § 332. *Id.* at 48a.

This reasoning does not conflict with any Supreme Court precedent discussing the concept of an implied repeal. Implied repeals, as explained in the cases cited by Petitioners on page 16 of the Petition, exist where one statute supersedes or limits the meaning of an entirely different statute, separately enacted at an earlier time, and not mentioned at all when the second statute was enacted. Because the Fifth Circuit did not find that § 372(c) repealed a portion of § 332 by implication, it was unnecessary for it to engage in the type of analysis used in *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555 (1963); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982) or *Rodriguez v. United States*, 480 U.S. 522 (1987), to determine whether the two statutes were manifestly inconsistent or in irreconcilable conflict.

Nor does the judgment below violate the principle that "when two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). In *Morton*, the Court held that the generally applicable anti-discrimination laws

passed in 1972 did not eliminate a longstanding specific provision establishing a preference for hiring Indians in the Bureau of Indian Affairs. Here, the Court construed a general provision (§ 332) alongside a specific one (§ 372(c)), and was careful to ensure, as did the Court in *Morton*, that both provisions were given effect. Petitioners cannot claim that the Fifth Circuit rendered § 332(d) meaningless; the Court recognized that § 332(d) has been and can be used "to alleviate judicial delay or prevent 'chaos.'" Pet. App. 44a.

In the end, it does not matter whether, as Petitioners contend, § 332(d) conferred authority to discipline judges prior to the passage of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. Whether § 332(d) contained such authority before 1980 does not answer the question whether § 332(d) as amended in 1980 contains such authority. Petitioners cannot point to any decision of a court or a judicial council since 1980 that has relied on § 332 to discipline or censure a judge.

2. The Judgment Below Does Not Conflict with this Court's Decision in *Richardson-Merrell v. Koller*, 472 U.S. 424 (1985)

Petitioners next contend that the Fifth Circuit's decision conflicts with *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424 (1985). The District Court in that case had disqualified the plaintiff's lawyers on the ground that they had engaged in misconduct. The Court of Appeals heard an immediate appeal from the order and found the disqualification to be invalid. The Supreme Court granted certiorari on the question whether orders disqualifying counsel in a civil case are collateral orders subject to immediate appeal. It held that they are not. The Court of Appeals had reasoned that an interlocutory appeal was necessary for an attorney to vindicate his reputation. This Court disagreed, and after cataloguing several other *judicial* avenues by which an

attorney might vindicate his reputation, it stated, in dicta, that an attorney injured by a disqualification decision "*might* be able to obtain relief from the Circuit Judicial Council pursuant to 28 U.S.C. § 332(d)(1)." *Id.* at 435 (emphasis added).

The comments in *Richardson-Merrell*, apart from being dicta, do not call into question the validity of the judgment below. By alluding to the fact that an injured attorney "might" be able to obtain "relief," this Court never stated that a judicial council had the power under § 332(d) to censure a judge.[2] It certainly did not take the further step to suggest that an appropriate "remedy" for the injury would be for the judicial council to reassign the case to another judge because it thought the judge had erred in his order disqualifying the attorney. Rather than conflicting with *Richardson-Merrell*, the Fifth Circuit followed its guidance. The Court in *Richardson-Merrell* admonished: "it is well established that Judicial Councils do not exist to review claims that a particular trial judge's rulings were erroneous." *Id.* at 435 n.2. The Fifth Circuit found that the Judicial Council, in ordering reassignment of the *Satz* and *Torres* cases, did review the correctness of Judge McBryde's rulings in excess of the power granted it by the statute.

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[2] The Court may have, for instance, contemplated that a judicial council could approach a judge informally and relay information that the aggrieved lawyer felt his reputation was unjustifiably attacked in the judge's orders. If, upon reflection, the subject judge agreed, apologized to the lawyer, and modified his order to remove some of the harsh language, it might be said that the judicial council remedied the problem. It is not the same, however, to allow a judicial council to use coercive measures such as public reprimands or case reassignments premised on disagreement with the subject judge's rulings.

3. The Judgment Below Does Not Conflict with Any Case Construing 28 U.S.C. § 137

Petitioners next argue that the Fifth Circuit erred in holding that § 137 does not confer authority on a chief judge to reassign cases in the circumstances of this case. To support their argument, they cite *Martinez v. Winner*, 771 F.2d 424 (10th Cir.), *modified on other grounds*, 778 F.2d 553 (10th Cir. 1985), *vacated on other grounds*, 475 U.S. 1138 (1986). *Martinez* held that a chief judge was immune from suit under 42 U.S.C. §§ 1981, 1985, 1986, and 1988, for allegations that he violated the plaintiff's constitutional rights when he assigned the plaintiff's criminal case to himself in contravention of the local rules. The court in *Martinez* held that the assignment of the criminal case was a judicial act for which the judge was immune from suit. The Fifth Circuit's decision is not only perfectly consistent with the disposition of completely unrelated issues in *Martinez*, it expressly followed two other Tenth Circuit cases that were directly on point in reaching the conclusion that § 137 did not confer authority to depart from the Local Rule governing the assignment of cases. Pet. App. 34a (following *Utah-Idaho Sugar Co. v. Ritter*, 461 F.2d 1100 (10th Cir. 1972) and *Kerr-McGee Corp. v. Ritter*, 461 F.2d 1104 (10th Cir. 1972)).

Nor does *Chandler v. Judicial Council of the Tenth Circuit of the United States*, 398 U.S. 74 (1970), provide any support for Petitioners' contention that § 137 authorizes a chief judge to reassign a case over the objection of a subject judge when he perceives the judicial rulings in the case to be contrary to the effective administration of justice. The majority of the Court in *Chandler* refused to rule on the merits of Judge Chandler's petition (which involved reassignment because of a docket backlog, not because of disagreement with the merits of judicial decisions), holding only that Judge Chandler had failed to exhaust his administrative remedies before petitioning for mandamus. *Id.*

at 87-88. To the extent that *Chandler* spoke at all to the applicability of § 137, it implicitly recognized that the disagreement of one judge as to the division of his caseload would preclude reassignment by a chief district judge under § 137. *Id.* at 87.[3]

4. The Judgment Below Presents No Recurring Problems for the Administration of the Judicial System by Judicial Councils

Petitioners' last contention is that the Fifth Circuit's decision deprives its judicial council of necessary authority to ensure the effective administration of justice. In this case, the Fifth Circuit made factual findings about Judge McBryde's conduct in *Satz* and *Torres* that are inconsistent with the conclusion that he impeded the effective administration of justice. More generally, Petitioners' contention is premised on a misrepresentation regarding the limits of § 372(c) and conflicts with the Council's own actions. Moreover, it inaccurately characterizes the practice of all other judicial councils, which have, since 1980, relied on § 372(c) as the exclusive method to discipline judges on contested allegations of misconduct.

First, Petitioners mischaracterize § 372(c) when they state that the Fifth Circuit's decision "insulate[s] from redress 'misconduct' that does not generate a formal Section 372(c) complaint." Section 372(c)(1) explicitly authorizes a chief judge to "identify" as a complaint allegations that are brought to his attention through informal channels, and to treat those allegations in the same manner as a complaint filed by a third party. The Chief Judge must, however, state his reasons for

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[3] It has not been suggested, and the Fifth Circuit never considered, whether § 137 would authorize the Judicial Council to reassign the cases. On the facts of this case, the Judicial Council obviously would have no such power.

identifying the complaint in writing, so that the subject judge is adequately informed of the charges. The Fifth Circuit's decision thus by no means "insulates" misconduct that comes to the attention of a Chief Judge without the filing of a citizen complaint.

Second, Petitioners' argument that the Fifth Circuit's opinion deprives the Council of the ability to redress the sort of conduct alleged in this case contradicts the actual behavior of the Council. As disclosed in another published opinion of the Fifth Circuit, the Fifth Circuit Judicial Council has in fact instituted proceedings against Judge McBryde pursuant to § 372(c). *In re McBryde*, 120 F.3d 519, 520 (5th Cir. 1997). As the Court's opinion notes, the bases for the § 372(c) proceeding include the same matters discussed by the Fifth Circuit panel opinion in this case, *i.e.* the *Satz* and *Torres* cases. *Id.* Judge McBryde has vigorously contested the authority of the Council to discipline him under § 372(c) based on disagreement with the merits of his judicial decisions, among other reasons. Nevertheless, the fact that the Council has itself used the § 372(c) process to investigate Judge McBryde's behavior in the *Satz* and *Torres* cases certainly undermines its assertion that the Fifth Circuit opinion deprives it of a "mechanism of judicial governance" that is "critical to the effective administration of the Judicial Branch." Pet. 21.

Third, Petitioners wrongly suggest that commentary in the Rules Governing Complaints of Judicial Misconduct, as promulgated by several circuits to implement § 372(c), contemplate judicial discipline under § 332(d). Pet. 20, n.15. That commentary only suggests that "informal methods of solving problems, traditionally used under section 332" have not been displaced by § 372(c). *See, e.g.*, D.C. Circuit Rules Governing Complaints of Misconduct, Rule 2, Commentary. Judge McBryde does not dispute that judicial councils can undertake to resolve misconduct problems "informally" and

"collegially," *see, e.g., id.*, Rule 20, without resorting to the formal hearing procedures of § 372(c). But here, the Council has rejected a "collegial" resolution, and Judge McBryde is unable, on principle, to consent to the measures taken by the Council. Under those circumstances, the Council may not, under § 332(d), issue significant sanctions, without affording Judge McBryde the hearing and confrontation rights conferred by § 372(c).

Finally, Petitioners suggest that the mechanism of § 372(c) is too cumbersome for judicial councils to deal with the "growing" problem of judicial misconduct. The Congress, in passing § 372(c) to supplement congressional powers of impeachment, instituted these procedures precisely because of the obvious threat to judicial independence that a system without these safeguards would present. H.R. Rep. 96-1313, 96th Cong., 2d Sess. (1980) at 14 ("the potential excesses of a circuit council must be controlled. As a consequence, paragraph (c)(11) requires that minimal due process rights be accorded any judicial officer whose actions or state of health are being investigated by a circuit council. The net effect of this paragraph is that the possibility of one group of federal judges arbitrarily 'ganging up' or 'hazing' another judge is prevented.").[4]

The ramifications of Petitioners' position are astonishing. Not only would it give judicial councils the right to censure a judge without notice or an opportunity to confront the evidence against him, it would also insulate that decision from review from either the courts, Pet. at 22-26, or the

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[4] Judge McBryde takes the position that § 372(c) is unconstitutional on its face. He does not concede that affording a judge the procedures available in § 372(c) eliminates the threat posed to judicial independence. His position on the constitutionality of § 372(c), however, has no bearing on the statutory scope of § 332—the issue on which Petitioners seek certiorari.

Judicial Conference, which has review authority under § 372(c). 28 U.S.C. § 372(c)(10) (limiting Judicial Conference review to orders issued pursuant to § 372(c)(6)). That it would be easier on judicial councils if they could act without the burden of affording a judge legislatively guaranteed rights and without having to defend their actions in a review proceeding is no reason to grant certiorari.

II.

PETITIONERS' ARGUMENT ABOUT STANDING PRESENTS NO ISSUE WORTHY OF REVIEW

Petitioners' second argument for granting certiorari is based entirely on a breathtaking misreading of this Court's opinion in *Paul v. Davis*, 424 U.S. 693 (1976). Petitioners say that *Paul* holds that injury to reputation does not qualify as injury-in-fact for purposes of Article III standing, and they argue that the Fifth Circuit's recognition of Judge McBryde's standing to challenge the transfer orders is therefore erroneous.

The problem is that *Paul* does not say anything like what Petitioners say it says. Indeed, *Paul* does not address standing or even touch on it at all. What it holds is *not*, as Petitioners suggest, that reputational injury does not confer Article III standing, but only that a reputational injury, without more, does not amount to a deprivation of a *constitutional* entitlement to liberty or property that can support a cause of action for denial of due process. That is, of course, an entirely different issue from injury in fact sufficient to confer Article III standing.[5]

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[5] Petitioners' claim that Judge McBryde "agreed in the court below that under *Paul*, injury to reputation was not constitutionally sufficient to constitute standing under Article III," Pet. at 24, is equally off the mark. As the actual language quoted in the footnote accompanying this

Indeed, if Petitioners' misreading of *Paul* were correct, no plaintiff could ever bring a defamation claim in a diversity case in federal court, since the reputational injury that the plaintiff sought to redress would not suffice to create a case or controversy within the Article III jurisdiction of the federal courts. Of course, that is not the law.

Even if *Paul* were relevant to standing, it is clear that this is not a case of "mere" injury to reputation as that concept is used in *Paul*. As the Fifth Circuit held, Judge McBryde was not simply the subject of some statement by a governmental body that might tend to injure his reputation; rather, he was subjected to an official "censure" by the Council (Pet. App. 48a), accompanied by the tangible sanction of deprivation of a part of his caseload. Petitioners cite not a single precedent from any source that holds that the subject of an official censure or reprimand does not have Article III standing to mount a legal challenge to that sanction.[6]

Finally, and most importantly, the Fifth Circuit's decision on standing does not turn exclusively, or even principally, on

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statement demonstrates, what Judge McBryde "conceded" below had nothing to do with Article III standing—all he "conceded" was that under *Paul* an injury to reputation without more could not support a cause of action for denial of due process. *See* Pet. at 24, n.21.

[6] Ironically, Chief Judge Politz, who as chairman of the Judicial Council is at the head of the lead Petitioner, recently wrote an opinion that finds that an attorney has Article III standing to challenge a district court opinion that criticizes him without imposing any sanction on him at all. *Walker v. Mesquite, TX*, 129 F.3d 831 (5th Cir. 1997). The court reached this result by equating the critical statements with an official "reprimand" and reasoning that the attorney's reputational interest in being free from an unwarranted reprimand gave him sufficient injury in fact to confer Article III standing on him. While Chief Judge Politz, in his capacity as head of the Judicial Council, may find it convenient to disavow the opinions he has written as a judge of the United States Court of Appeals for the Fifth Circuit, such inconsistency hardly enhances the persuasive force of the Council's arguments.

reputational injury. The Court's primary holding was that Judge McBryde had standing based on his interest (albeit not a "constitutionally protected property or liberty interest") in "deciding [the *Satz* and *Torres*] cases free from the specter of interference, except by the ordinary process of appellate review." Pet. App. 35a. Petitioners do not challenge this holding in their questions presented, nor does the body of the Petition for Certiorari present any argument that this aspect of the Fifth Circuit's decision on standing was incorrect or otherwise appropriate for review by this Court.[7] Nor do Petitioners muster any arguments that tend to undercut the Fifth Circuit's reliance on *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74 (1970), as indicating that such circumstances give a federal judge Article III standing.[8] Since the Fifth Circuit's analysis is sufficient to support its decision irrespective of reputational injury, Petitioners' arguments, which are solely directed to reputational injury, provide no basis for reviewing the Fifth Circuit's

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[7] Indeed, the Fifth Circuit's holding in this respect is consistent with this Court's recent discussion of "institutional injury" in *Raines v. Byrd*, 117 S.Ct. 2312 (1997), which the Petition cites for a different point. In *Raines*, this Court held that a purely abstract and hypothetical claim that the "line-item veto" diluted the effectiveness of a Senator's vote did not allege injury in fact under Article III. The Court, however, distinguished its prior holding in *Coleman v. Miller*, 307 U.S. 433 (1939), which recognized an injury and found that legislators had Article III standing where the result of a specific vote they had taken had been nullified. *See* 117 S.Ct. at 2319-20. Here, Judge McBryde had his ability to take actions in two specific cases taken away, and his prior actions in those cases were nullified. Under the reasoning of *Coleman*, as explained in *Raines*, that plainly suffices for standing purposes.

[8] The Fifth Circuit relied on the express discussion of standing in Justice Harlan's concurrence in *Chandler*, 398 U.S. at 106, n.9, but the court could as easily have relied on the majority's decision, which held that mandamus was inappropriate—a holding that necessarily assumed, as an antecedent matter, the existence of an Article III case or controversy.

independently grounded conclusion that Judge McBryde's mandamus action presented a case or controversy within the meaning of Article III.

III.

OTHER REASONS MILITATE IN FAVOR OF THE DENIAL OF THIS PETITION

Judge McBryde's efforts to challenge the Council's October 20 order resulted in a carefully reasoned judgment that recognized the right of every judge to decide cases freely and as he sees fit. If judicial councils were to follow the Fifth Circuit's reasoned judgment, a district judge would be able to conduct his judicial business without fear or concern that a judicial council who disagreed with his decisions could reprimand him for it. And the judgment secures the position of the courts of appeals as the only avenue by which an aggrieved person may seek relief from a district judge's adverse rulings. In short, the Fifth Circuit got it exactly right.

Although the correctness of the decision below is not normally a preeminent factor in this Court's decision whether to grant a writ of certiorari, it is an important consideration in this case, where the sole argument that the decision is sufficiently important to merit review is that the lower court erred. Pet. 25. Forcing Judge McBryde to continue his efforts to defend the judgment and his principles in this Court in and of itself undercuts his independence and further distracts him from his duties as a judge. This factor should give this Court pause in accepting this case for review simply because it may be novel and interesting.

CONCLUSION

For the above-stated reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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